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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, *et al.*,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a fundamental change in interpretation of the critical surplus land act begun by a District Court just prior to the state court decision at issue, but only subsequently adopted by the Circuit Court of Appeals and more fully expanded in later litigation, constitutes a sufficient change in law to preclude application of collateral estoppel on the basis of that state court decision.

2. Whether the doctrine of collateral estoppel should be applicable where the essential purposes of the doctrine and related considerations are not substantially served by its application.

LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were as follows: The Counties of Mahnomen, Clearwater, and Becker, Minnesota; Elmer H. Winter, Kenneth Albertson, Joe Klinkbomme, and Ed Graham; the State of Minnesota and two of its officials — Joseph N. Alexander, Commissioner of the Department of Natural Resources, and Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Department of Natural Resources; the White Earth Band of Chippewa Indians; and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, the Counties of Mahnomen and Clearwater, Minnesota, and the individual defendants below, Elmer H. Winter, *et. al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 14, 1982.

OPINIONS BELOW

Two memoranda opinions were issued by the District Court. The first, a Memorandum and Order, was filed on May 30, 1980, and is unreported. The second, also entitled a Memorandum and Order, was filed on June 25, 1981, and is reported at 518 F.Supp. 527. The Court of Appeals issued an Opinion on May 14, 1982, which is reported at ____ F.2d ____. The preceding opinions appear in the Appendix in reverse chronological order at 1a through 51a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Judgment of the Court of Appeals was entered on May 14, 1982. By Order dated July 21, 1982, the time for filing this petition for writ of certiorari was extended to September 11, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTE INVOLVED

The relevant statute is the Act of January 14, 1889 (25 Stat. 642), which is reproduced in part in the Appendix at 52a *et seq.*

STATEMENT OF THE CASE

A. Proceedings Below

Underlying the instant petition are two consolidated actions for declaratory and injunctive relief brought in 1974 by the White Earth Band of Chippewa Indians and the United States against the State of Minnesota and various officials of the State of Minnesota's Department of Natural Resources.[1] *White Earth Band of Chippewa Indians* v. *Alexander, et al.*, Civ. No. 3-74-63 and *United States* v. *State of Minnesota*, Civ. No. 3-74-305 (D. Minn.). The focus of these suits is the hunting and fishing rights of the Band and its members within the White Earth Reservation as originally established by the Treaty of March 19, 1867 (16 Stat. 719). In its suit, the Band sought a declaratory judgment that enrolled members of the White Earth Band have the right to hunt and fish within the 1867 Reservation free of State regulation and that the Band has the authority to regulate the hunting and fishing activities of all persons - Indian and non-Indian alike - within that area; it also sought an injunction barring the State from enforcing its hunting and fishing laws within the original reservation. *See* Complaint, Civ. No. 3-74-63. The United States, on the other hand, only sought declaratory and injunctive relief

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1. The Counties of Mahnomen, Becker, and Clearwater, as well as the individual parties — Elmer Winter, *et al.* — subsequently intervened as defendants in Civ. No. 3-74-63.

and injunctive relief in regard to the right of enrolled members of the Band to hunt and fish free of State regulation within the thirty-two townships of the 1867 Reservation considered in *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980). *See* Amended Complaint, Civ. No. 3-74-305.

By Memorandum and Order dated May 30, 1980 (App. at 47a-51a), the District Court granted the Plaintiff's Motion for Issue Preclusion on the basis of *State* v. *Clark*, *supra*, thereby precluding the Defendants, under the doctrine of collateral estoppel, from relitigating the reservation disestablishment issue as to the thirty-two townships decided in that case.

In May of 1981, the remaining issues were submitted for decision on the basis of a stipulated record, briefs, and oral argument. On June 25, 1981, the District Court issued a Memorandum and Order (App. at 23a-46a) in which it ruled that the remaining four townships of the original White Earth Reservation has been disestablished (App. at 27a-35a), that the Band has only a statutory right to condition entry by non-members for the purpose of hunting and fishing on Indian and tribal trust lands (App. at 35a-40a), and that the State has the authority to continue to regulate hunting and fishing by non-members of the Band on those lands (App. at 40a-45a).

From the Judgment of the District Court, four appeals were taken. The Tribe appealed from those portions of the June 25, 1981 Memorandum and Order

pertaining to the reservation status of the four townships and the authority of the State to regulate hunting and fishing by non-members on Indian trust lands (Appeal No. 81-1861). The Counties, the State and its officials, and the individual defendants cross-appealed from the May 30, 1980 Memorandum and Order (Appeal Nos. 81-1805, 81-1833, and 81-1862). In an Opinion issued on May 14, 1982, the Court of Appeals affirmed the District Court in all respects. App. at 1a-22a.

B. The Factual Background

The White Earth Reservation, as established by the Treaty of March 19, 1867 (16 Stat. 719), consisted of thirty-six townships or approximately 854,740 acres.[2] *See Clark* Stipulation, ¶21.[3] In 1889, title to the lands of this reservation not necessary for allotments, essentially four townships,[4] was ceded by the White Earth Indians to the United States under the Act of January

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2. All of Mahnomen County, eight townships in the southern portion of Clearwater County, and twelve townships in northern Becker county are located within the boundaries of the 1867 Reservation. The individual defendants, Elmer Winter, *et al.*, own land located within the original Reservation.

3. "Clark Stipulation" refers to the facts stipulated to in *State v. Clark* and incorporated into the record in this case.

4. These four townships are in the northeastern portion of the original Reservation and are located in Clearwater County. *See Clark* Stipulation, ¶ 35.

14, 1889, 25 Stat. 642 (App. at 52a-54a) - commonly known as the Nelson Act. *See, e.g.*, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890); *Clark* Stipulation ¶¶ 35-37. Virtually all of the remaining thirty-two townships were subsequently allotted pursuant to the requirements of § 3 of the Nelson Act, as amended, to some 5,000 individual Indians.[5] *See, e.g.*, Department of the Interior - Office of Indian Affairs, *General Data Concerning Indian Reservations* at 6 (1929); *Chippewa Indians of Minnesota v. United States*, 90 Ct. Cl. 140, 143 (1940). Of the lands allotted, approximately 645,500 acres eventually passed out of trust status. *Clark* Stipulation, ¶ 38. At present, over seventy percent (70%) of the population within the 1867 Reservation is non-Indian (*compare* ¶ 19 of *Clark* Stipulation *with* ¶ 20), and substantially more than fifty percent (50%) of that area is non-Indian owned.[6] *See Clark* Stipulation, ¶¶ 21-33; App. at 36a. In regard to the four ceded townships, about 2,900 acres of this approximately 92,000 acre area are presently held in trust for the Minnesota Chippewa Tribe. App. at 29a.

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5. No allotments were made in the four ceded townships. *Clark* Stipulation, ¶ 37.

6. At present, the United States holds approximately 54,000 acres in trust for the White Earth Band and approximately 2,000 acres in trust for individual members of the Band within the 1867 Reservation. *Clark* Stipulation, ¶¶ 30 and 31.

Because the focus of the instant case is the right of the White Earth Indians to hunt and fish within their reservation free of State regulation, the extent to which the White Earth Reservation presently exists is necessarily involved. *Compare, e.g., Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-06 (1968) *with White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 144 n.11 (1980); *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973). And, it is because the disestablishment question is involved that the instant case is of particular importance to the State, the Counties, and the non-members of the Band residing in that area. First, it is well established that the State's and Counties' regulatory authority over Band members within their existing reservation, even with the application of Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360), is significantly limited.[7] Second, whatever

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7. Public Law 280 was automatically extended to all the existing Indian Country in Minnesota, except the present Red Lake Reservation. *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360. Public Law 280, however, does not encompass the taxing or regulatory authority of the state and local governments. *See, e.g., Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 661-63 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). Moreover, State regulation of existing hunting and fishing rights is expressly exempted from coverage under Public Law 280. 18 U.S.C. § 1162(b).

inherent regulatory authority a tribal entity may have over non-members necessarily exists only within that entity's present territory - i.e., reservation. *See, e.g., Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 102 S.Ct. 894, 901-05 (1982); *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at 151; *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In this regard, Indian Tribes have been recognized as having "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands...."[8] *Montana v. United States*, 450 U.S. 544, 565 (1981). And finally, non-Indian activities on-reservation may, in certain circumstances, be exempt from State and local law. *See, e.g., Ramah Navajo School Board v. New Mexico*, ____ U.S. ____, 102 S.Ct. 3394 (1982); *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at 144; *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

It is also noteworthy that the ultimate interpretation given the Nelson Act in this context will have significance for much of northern Minnesota. This is so

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8. Among other things, this sovereign authority has already been recognized to include the power of taxation. *See, e.g., Merrion v. Jicarilla Apache Tribe, supra*, 102 S.Ct. at 901-09; *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

dealt with only a single reservation (*see generally Montana* v. *United States*, *supra*, 450 U.S. at 559 n.8), this Act dealt with all the Chippewa Indian reservations in Minnesota together - twelve reservations in all encompassing some 4,700,000 acres in 1889. *See, e.g.*, App. at 29a, 52a; H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 27 (1890).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT ON AN ISSUE OF IMPORTANCE IN THIS AND ANY OTHER LEGAL CONTEXT WHERE THE GOVERNING PRINCIPLES HAVE NOT REMAINED STATIC.

Underlying the decision of the Court of Appeals to preclude the governmental and individual defendants from relitigating the disestablishment issue considered in *State* v. *Clark*, (App. at 9a-13a) is an unnecessarily narrow and rigid interpretation of the long established change in law exception. The resolution of this issue is not only significant in this context because of the scope of the Nelson Act, but in any other legal context where the controlling principles have been the subject of changing interpretations.

It is a well recognized rule that collateral estoppel "must be used with its limitations in mind so as to avoid injustice...." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). With this general concern in mind, it was established long ago that intervening judicial decisions "may

so change the legal atmosphere as to render the rule of collateral estoppel inapplicable...." *Id.*, 333 U.S. at 600. *Accord, e.g., Montana* v. *United States*, 440 U.S. 147, 161-62 (1979). The primary purpose of this exception is to avoid the inequitable administration of the laws. As pointed out in *Commissioner* v. *Sunnen*,

> [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities....

Id., 333 U.S. at 599. *Accord, Montana* v. *United States*, *supra* at 161 (*quoting* above statement in part). In determining whether there has been a sufficient change in legal atmosphere, the focus in on whether there has been a significant development or modification in the controlling legal principles. *See, e.g., Montana* v. *United States*, *supra*, 440 U.S. at 161-62; *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 599-600. Such a "major doctrinal shift[ ]" (*Montana* v. *United States*, *supra* at 162) has occurred in regard to the Nelson Act subsequent to the decision in *Clark*.[9]

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9. In this regard, it is generally recognized that collateral estoppel "'has never been applied to isues of law with the same rigor as to issues of fact.'" *Western Oil & Gas Association* v. *United States Environmental Protection Agency*, 633 F.2d 803, 809 (9th Cir. 1980), *quoting Segal* v. *AT&T*,

Critical to the decision in *Clark* was the conclusion that the underlying purpose of the Nelson Act - the surplus land act at issue here - was not disestablishment. *Id.*, 282 N.W.2d at 906-07. In reaching this conclusion, the Minnesota Supreme Court relied upon *State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978) and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971) (Devitt, C.J.),[10] quoting Judge Devitt's opinion in the latter case for that very proposition. *Id.*, 282 N.W.2d at 906-07. That this viewpoint substantially controlled the disposition of the disestablishment issue is readily apparent from the following excerpt from *Clark*:

(cont.)

606 F.2d 842, 845 (9th Cir. 1979). *Accord American Medical International, Inc. v. Secretary of Health, Education and Welfare*, 677 F.2d 118, 123 (D.C. Cir. 1981); *Dorsey v. Solomon*, 435 F. Supp. 725, 742 (D. Md. 1977). *See generally* 1B *Moore's Federal Practice*, ¶ 0.442 [1]. Because congressional intent underlying the surplus land act in dispute is the focal point in disestablishment cases (*see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977)), the issue which the County and individual petitioners seek to relitigate is essentially one of law and, therefore, this general rule is applicable here.

10. These two cases considered the disestablishment effect of the Nelson Act in the context of the original Leech Lake Reservation. Both found that the Nelson Act did not alter the boundaries of that reservation.

> The conclusions reached in *State* v. *Forge*, *supra*, and *Leech Lake Band of Chippewa Indians* v. *Herbst*, *supra*, apply with even greater force to the disestablishment claim raised in this case. By its terms, the Nelson Act provided that the Indians were to move . . . to the White Earth Reservation. If this Act did not terminate the reservation from which the Indians were to be removed then, *a fortiori*, it did not terminate the reservation they moved to....

Id., 282 N.W.2d at 907. In *United States* v. *Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980), Judge Devitt implicitly rejected the interpretation of the Nelson Act espoused in his 1971 *Leech Lake* decision when he expressly stated that the underlying purpose of the Nelson Act was to restore lands to the public domain (*United States* v. *Minnesota*, *supra*, 466 F.Supp. at 1386 n.1, 1387) - language which is, without question, precisely suited to disestablishment. *See*, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 589 n.5; *DeCoteau* v. *District County Court*, 420 U.S. 425, 426-27, 446, & 448-49 (1975); *Seymour* v. *Superintendent*, 368 U.S. 351, 355 (1962). After the decision in *Clark*, the Eighth Circuit affirmed *United States* v. *State of Minnesota*, "on the basis of the trial court's well reasoned decision..." thereby adopting the District Court's new interpretation of the Nelson Act as that of the Circuit. *Red Lake Band of Chippewa Indians* v. *State of Minnesota*, 614 F.2d 1161, 1162 (8th Cir.), *cert. denied*, 449 U.S.

905 (1980). Thus, subsequent to the *Clark* decision, the viewpoint regarding the Nelson Act espoused by Judge Devitt in *United States* v. *State of Minnesota*, became the law of the Eighth Circuit. Moreover, the development of this interpretation has continued in the context of the four townships actually considered in the instant cases. In both the opinion of the Eighth Circuit and the District Court, it was recognized that the purpose of the Nelson Act was to assimilate the Indians into non-Indian society "by breaking up the reservation system...." App. at 14a n.5, 29a.

What the preceding discussion demonstrates is that the interpretation of the Nelson Act espoused in *Clark* is plainly at odds with that now prevailing in the Eighth Circuit. The court below, however, ignored this fundamental conflict, finding instead that issue preclusion was appropriate because the *Clark* court had the district court decision in *United States* v. *Minnesota* before it and because it followed the analysis set forth in *Rosebud* and *DeCoteau*. Ultimately though, what this approach results in is the inflexible application of collateral estoppel - an approach uniformly condemned by the courts. *See generally* 1B Moore's *Federal Practice*, ¶¶ 0.405[11] and [12]. It is certainly true that *United States* v. *Minnesota* was before the *Clark* court, but it was only a decision of a district court which had yet to be tested in the appellate courts. It was not until that decision received the imprimatur of the Circuit Court subsequent to the *Clark* decision did the new interpretation begin

to take on the dimensions of a significant doctrinal change.[11] Indeed, the decision whether to consider an untested opinion of a district court as constituting a change in law would require extraordinary prescience. It is more likely then, that a major doctrinal shift occurs when the question involved is passed upon by the appellate courts since a district court decision, standing by itself, is rarely considered to constitute such a change. Furthermore, that the *Clark* court may have employed the proper analytical approach does not remedy the fact that that court took a fundamentally different perspective as to the purpose of the Nelson Act for the very matter at issue - its disestablishment effect - than that subsequently adopted by the Eighth Circuit.

In addition, it is significant that precluding relitigation of *Clark* in this context results in the very evils the change in law exception is intended to avoid - "inequalities in the administration of the ... laws, discriminatory distinctions..., and a fertile basis for litigious confusion...." *Montana* v. *United States*, *supra*, 440 U.S. at 161, *quoting Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 599. This disestablishment issue decided in *Clark* was based upon an interpretation established in the 1971 *Leech Lake* decision. Subsequently, the disestablishment issue decided in *Red Lake Band of Chippewa Indians* and, indeed, the disestablishment of the four

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11. The expanded interpretation of the Nelson Act proffered in this case dramatizes this change.

townships decided in the instant cases, was based upon operative assumptions which conflict with those of *Leech Lake* and *Clark*. There is, moreover, a real threat that further inequitable treatment will result in this context since the Nelson Act dealt with some twelve reservations in all. Because the prevailing interpretation of the Nelson Act in the Eighth Circuit conflicts with that esposued in *Clark* and the decisions upon which it is based, there is plainly "a fertile basis for litigious confusion" over the effect of the Nelson Act in northern Minnesota. Thus, the application of issue preclusion will obviously result in "discriminatory distinctions" and unjust administration of the laws and, therefore, the decision of the lower court sustaining its application should be set aside.

II. THE CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD BE APPLIED WHERE THE PURPOSES UNDERLYING ITS USAGE ARE NOT SUBSTANTIALLY SERVED BY ITS APPLICATION - A QUESTION WHICH SHOULD BE, BUT HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT.

The Court of Appeals rejected the Petitioners' argument that collateral estoppel should not be applied because the purposes of the doctrine were not substantially served by its application in the instant cases. App. at 12a-13a. The Second Circuit and the Court of Claims have indicated that the doctine of collateral estoppel should not be mechanically applied where the underlying purposes of the doctrine are not thereby served. *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou*,

Inc., 495 F.2d 1265, 1276 (2d Cir. 1974); *Technograph Printed Circuits, Ltd.* v. *United States*, 372 F.2d 969, 976-77 (Ct.Cl. 1967). And, although this Court has not directly addressed the question, it has expressed some concern regarding this problem. *See Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 329-30 (1979). In any event, because particular emphasis is placed on the purposes issue preclusion is intended to serve (*See, e.g., Montana* v. *United States*, *supra*, 440 U.S. at 153-54; *Parklane Hosiery Co., Inc.* v. *Shore*, *supra*, 439 U.S. at 326), and because it is well established that the doctrine should not be applied inflexibly to deny justice, it is only logical that the courts would be reluctant to apply the doctrine where its express purposes are not adequately served by its usage. It is therefore evident that particular care should be taken in the first place in order to ensure that those purposes are in fact substantially served where a claim is made that they are not. In the instant case, the Eighth Circuit failed to do so, opting instead for an overly rigid and formalistic approach, thereby effectively working an injustice on the Petitioners.

The doctrine of collateral estoppel "protects [a litigant's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana* v. *United States*, *supra*, 440 U.S. at 153-54. A careful examination of the circumstances underlying the instant litigation reveals that these concerns are not substantially served

by estopping the Petitioners from relitigating the effect of the Nelson Act on the thirty-two townships considered in *Clark*.

The concerns of protecting litigants from the burden of multiple lawsuits and promoting judicial economy are both accomplished "by preventing needless litigation...." *Parklane Hosiery Co., Inc.* v. *Shore*, *supra*, 439 U.S. at 326. As the historical circumstances show, however, needless litigation has not been forestalled by application of collateral estoppel here, since the issue the Petitioners seek to relitigate - the status of the thirty-two townships - is essentially the same issue as that respecting the remaining four townships litigated (at the behest of the plaintiff Band) in the instant case.[12] As established by Treaty in 1867, the White Earth Reservation consisted of thirty-six townships. *See discussion*, *supra*, at 4. In 1889, title to the lands of this reservation which were not necessary for allotments, essentially four townships, were ceded by the White Earth Indians pursuant to the Nelson Act. *See id.*. The remaining thirty-two townships were expressly reserved under that Act for the purpose of making allotments. *See id.* at 5. With these thirty-two townships as the focal point, the issue in *Clark* was whether the White Earth Reservation,

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12. As pointed out in *Technograph Printed Circuits, Ltd.*, *supra*, "[i]n each instance the question remains whether the new litigation is truly needless...." *Id.*, 372 F.2d at 977.

as established in 1867, was disestablished by the Nelson Act. *Id.*, 282 N.W.2d at 905. With respect to the status of the four ceded townships, the very same question obtains; that is, the ultimate question whether those four townships were also disestablished by the Nelson Act. Because essentially the same legal issue is presented in both instances, the congressional and other documentation relevant to ascertaining the intent of Congress underlying the Nelson Act, as well as the pertinent historical background (see *generally Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)), must be considered in each instance. It is, therefore, apparent that as a result of the Band's own efforts at litigating the status of the four townships, application of issue preclusion in the instant case is not substantially protecting the litigants from the expense and vexation of having to relitigate an issue already decided.

In rejecting this assessment, the Eighth Circuit emphasized that the four townships were the subject of different provisions of the Nelson Act. App. at 12a. True, the four townships considered in the instant case were the subject of different disposition provisions, but this ignores what must actually be considered in resolving the disestablishment question here. The fact is that the entire historic White Earth Reservation was the subject of and was, in fact, dealt with by the Nelson Act. *See also DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) (the status of the entire historic reservation - both allotted and ceded lands - considered as a unified

whole). Thus, regardless of whether the status of the entire 1867 Reservation or just the four ceded townships is under consideration, the same legislative documentation and the same administrative materials interpretive of the Act must be consulted. *See also id.* Moreover, because virtually all the post-Nelson Act documentation deals with Indian activities within the area of the original reservation and with what was considered to be the present reservation, that documentation is equally relevant in either situation. What is apparent then, is that since essentially the same documentation must be considered whether the four ceded townships alone or the entire thirty-six townships are at issue, substantial overlap exists between the two issues. Thus, if, as the Eighth Circuit concluded, application of collateral estoppel in this case actually avoided needless litigation, what was avoided was incidental at best.

Nor has the application of the doctrine truly served the purpose of fostering reliance on judicial action since the possibility of inconsistent decisions has not actually been minimized. This is the product of the conflict which now exists in the case law respecting the underlying purpose of the Nelson Act. As discussed earlier, there is no question that the interpretation of the Nelson Act espoused in *State* v. *Clark* and the cases upon which it is based - *State* v. *Forge*, *supra* and *Leech Lake Band of Chippewa Indians* v. *Herbst*, *supra*, directly conflicts with that subsequently adopted by the Eighth Circuit in *Red Lake Band* and more fully expanded in the instant

case. The result of this conflict is that one approach governs the thirty-two townships of the original White Earth Reservation and the historic Leech Lake Reservation considered in *Forge* and *Leech Lake Band*, while an entirely different approach governs the original Red Lake Reservation and the four townships of the original White Earth Reservation considered in the instant case. And, this inconsistency is of no little moment since, as noted above, the Nelson Act dealt with twelve separate reservations.

The Eighth Circuit disagreed with this assessment stating that "[d]iffering conclusions on the issue of disestablishment of particular reservations may result from different fact situations rather than differing interpretations of the law...." App. at 12a. As with other aspects of its reasoning in this context, this analysis ignores the realities of the reservation disestablishment question. It is certainly true that subsequent variations in legislative or administrative treatment can alter the effect the Nelson Act was intended to have on the reservation areas affected by the Act. Nonetheless, at the outset analysis must focus upon the congressional intent underlying that Act. *See, e.g., Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U.S. at 586; *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 444. It is in this respect that precluding relitigation will not minimize inconsistent decision-making since a conflict already exists in the present case law regarding the underlying purpose of the Nelson Act.

To be considered with this is the fact that the public interests - a matter entitled to consideration in this context (*see, e.g., Porter & Dietsch, Inc. v. FTC*, 605 F. 2d 294, 300 (7th Cir. 1979)) - favors relitigation. The issues involved here are of great importance jurisdictionally to not only the governmental entities involved but to those persons - Indian and non-Indian alike - who reside within or visit the area encompassed by the original White Earth Reservation. *See* discussion, *supra* at 6-7. And, as the previous discussion establishes, uncertainty as to the scope and effect of the Nelson Act, due in large part to *Clark*, persists. In fact, because of the conflict which now exists in the case law respecting that Act, and because eleven other historic reservation areas were affected by the Act, this dispute is likely to recur until the issue is reconsidered under the new perspective espoused in the more recent case law. It is, therefore, apparent that a definitive resolution of the effect the Nelson Act had on the 1867 White Earth Reservation under the perspective now espoused by the Eighth Circuit - is needed to settle this matter once and for all. In conclusion then, not only are the purposes of the doctrine not substantially served by its application in the instant case, but the public interest also favors relitigation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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